

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 99-0652
SALES/USE TAX
For Years 1996 and 1997**

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ISSUES

I. Sales/Use Tax – Best information available; failure to maintain adequate records

Authority: IC 6-8.1-5-1(a); IC 6-8.1-5-4(a); IC 6-8.1-5-4(c) IC 6-8.1-5-1(b).

Taxpayer argues that the proposed assessment should be reduced because, in the taxpayer's opinion, the auditor's assessment, which was based on the best information available, was unreasonable.

II. Sales/Use Tax – Credit for sales tax previously paid

Authority: None

Taxpayer requests credit for sales tax previously paid for which the taxpayer provides documentation to prove such payment.

III. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer is in the business of selling trees, shrubbery, plants, flowers, and landscaping materials. Taxpayer designs landscape plans for customers and will complete the installation of all materials or will sell the materials to the customers for them to plant. Taxpayer has installed a greenhouse and grows plants for sale.

Audit revealed that taxpayer failed to document transactions that would show that it paid the appropriate tax on certain items. These items were picked up on audit, and taxpayer was assessed tax appropriately. Where records were missing or incomplete, the auditor used the best information available to estimate an appropriate amount of sales that would be subject to tax.

Taxpayer claims that it has documentation to prove it has paid sales tax in some circumstances. Taxpayer protests the best information available audit because, in its view, the auditor grossly overestimated taxpayer's retail sales.

I. Sales/Use Tax – Best information available; failure to maintain adequate records

DISCUSSION

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. IC 6-8.1-5-1(a). Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. IC 6-8.1-5-4 (a). A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times. IC 6-8.1-5-4 (c). The notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC 6-8.1-5-1(b).

For 1996 and 1997, taxpayer failed to report the correct amount of taxable sales. Taxpayer had destroyed the sales invoices and monthly sales recap sheets after sales tax returns were completed. With the help of taxpayer's accountant, those records were reconstructed and the information was used to base the assessment for sales tax.

A sample month of June 1999 was used to calculate the amount of exempt sales. The percentage for that month was determined to be 11.31%, and this percentage was applied to the tax years in question. Taxpayer protests the application of this percentage as inappropriate on two bases:

- 1) Taxpayer only had the facilities to sell items at retail for a fraction of the audit period. Therefore, in taxpayer's eyes, it didn't have the capacity to make the sales the auditor claimed it made, and that the income from that time period must have been derived from service (exempt) activities.
- 2) The month of June 1999 was a statistically misleading month, as taxpayer's retail sales were abnormally high when compared to any other month during that year.
- 3) The auditor failed to account for labor-related sales, such as mowing, in arriving at taxpayer's estimated retail sales.

Taxpayer has provided the Department with records that show that a building used for equipment storage was converted into a retail shop in 1997. That year, taxpayer also had a greenhouse built that would have increased taxpayer's retail sales. Taxpayer stipulates that the shop was not fully operational until some time in 1998, but cannot substantiate that claim with evidence.

Taxpayer has also provided the Department with a sample of sales-related statistics, primarily from the 2000 tax year. Taxpayer contends that these statistics show that more than 11.31% of its sales are exempt from sales tax.

Taxpayer must overcome the burden of proving that the Department's *prima facie* evidence of a valid claim. To do so, the taxpayer must show that the Department's basis for evaluating the taxpayer's sales is wrong. Several factors should be considered in determining the best possible method of determining the sales for a taxpayer that fails to maintain adequate records.

In the case at hand, it seems prudent that, for a landscaping firm to have retail sales, that firm would greatly be aided by having a showroom to display its wares. It would also greatly benefit the firm to have a greenhouse in which to grow plants and from which those plants may be sold. Under the circumstances, it seems relevant that taxpayer did not have either of those until some point in the middle of the audit period. Taxpayer's estimated sales should reflect that fact.

In an industry that is as seasonally dependent as the landscaping industry, this would imply the need to take the good with the bad – i.e. look at the winter months along with the summer months. To take the sales of a landscaping firm during June and apply the factors derived from that month and apply it to January is unreasonable.

FINDINGS

The taxpayer is sustained, subject to audit review, to the extent that it can show that its lack of retail operations affected its retail income during the audit period, and to the extent that it can show that the Department's use of the June 1999 sales figures is misrepresentative.

II. Sales/Use Tax – Credit for sales tax previously paid

Taxpayer has delivered to the Department documents that show sales tax was previously paid on items for which it was assessed use tax. Credit shall be given for those items for which the Department has been provided substantial documentation.

FINDINGS

The taxpayer is sustained.

III. Tax Administration- Ten Percent (10%) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness,

thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

In spite of the fact that taxpayer has raised several good points with regards to the best information available estimates, and despite the fact that taxpayer has substantiated some of its claims that it has paid sales tax on items purchased for which the auditor could previously locate no such records, the fact remains that, if not for taxpayer's failure to properly keep records, the audit would not have had to have been completed on a best information available basis. Reasonable care would also dictate that a taxpayer would keep records of sales tax paid for several years after its sales tax returns had been filed.

FINDINGS

The taxpayer is respectfully denied.